Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States

ALEKSANDR J. STOYANOV,
Petitioner

v.

DEPARTMENT OF THE NAVY,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits his petition for a writ of certiorari to vacate the appeals court decision, which affirmed erroneous district court orders that far departed from justice, neglected evidence, and contradicted this Court's decisions. The appeals court unpublished decision calls for an exercise of this Court's supervisory power and presents the following questions:

1. Whether the district court erred by denying Petitioner relief and sanctions against the Respondents for engaging in deceptions, fraud, and frivolous contentions that established Respondents' guilt?

2. Whether the district court's denial of a jury trial abused discretion by neglecting Petitioner's direct evidence of retaliation and the undisputed evidence showing that the Respondents' actions were motivated by retaliatory animus.

3. Whether the district court erred neglecting the pattern of adverse employment decisions and antagonism combined with the direct evidence of retaliation that established irrefutable evidence to defeat summary judgment and to send this case to the jury?

LIST OF PARTIES

ALEKSANDR J. STOYANOV,
Petitioner,
v.
DONALD C. WINTER, Secretary of the Navy;
STEPHAN W. PETRI, individually and in his official capacity as Head of Carderock Division Naval Surface Warfare Center;
GARY M. JEBSEN, individually and in his official capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
GERALD A. SMITH, individually and in his official capacity as Deputy Head of Code 70, Carderock Division Naval Surface Warfare Center;
M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709;
KEVIN N. WILSON, Individually and in his Official Capacity as the Acting Head of Code 74 Carderock Division;
JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division;
JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74 Carderock Division;
STEPHAN M. FARLEY, Individually and in his Official Capacity as the Head of Code 741 Carderock Division; ROGER P. FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division;
DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39;
Respondents

CERTIFICATE OF INTEREST

The Petitioner Aleksandr J. Stoyanov certify the following:

1. The full name of every party or amicus represented by us is: None
2. The name of the real party in interest represented by us is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by us in the trial court or agency or are expected to appear in this court are: None

5/21/10
Date

Aleksandr Stoyanov
Aleksandr Stoyanov

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1. U.S. Court of Appeals for the Fourth Circuit, Docket No. 09-1900, (1:06-cv-01245-AMD) Order February 26, 2010. (Appendix page A1)

2. U.S. Court of Appeals for the Fourth Circuit, Docket No. 09-1900, (1:06-cv-01245-AMD) Unreported December 17, 2009, Unpublished Per Curiam Opinion (Appendix p. A2)

3. U.S. District Court Order and Judgment dated July 6, 2009, Docket No. 06-01245-AMD (Appendix p. A3)

4. U.S. District Court Memorandum Opinion dated July 6, 2009, Docket No. 06-01245-AMD. (Appendix p. A4)

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued Order denying timely petition for rehearing en banc on February 26, 2010. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

Age Discrimination in Employment act of 1967, 29 U.S.C. 621 et seq. ("ADEA"); Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq. ("Title VII"); Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) ("WPA"); 5 U.S.C. §§2301-2302; 42 U.S.C. §1983.

STATEMENT OF THE CASE

Petitioner Dr. Aleksandr Stoyanov submits his petition for a writ of certiorari to vacate the appeals

court decision, which sanctioned erroneous interpretation of facts and law in the district court orders and judgment that clearly abused discretion and made decisions neglecting evidence and far departing from this Court's decisions. The appeals court for the fourth circuit did not address any issue raised by Petitioner, but sanctioned unjust and erroneous reasons stated in the district court opinions that ignore facts, conflict with the relevant decisions of this Court and decisions of other appeals courts. The petition for a writ of certiorari should be granted because the lower courts far departed from justice, this Court's decisions, and facts supporting Petitioner's case and presented below:

1) As a last resort for legal remedies, Petitioner appeals to this Court to exercise supervisory power and restore justice because the appeals court sanctioned abuse of discretion as the district court wrongly denied jury trial by ignoring the direct evidence of intentional retaliations, discrimination, and Respondents' conspiracy to deceive, discriminate, and retaliate against Petitioner for participation in protected activities.

2) Petitioner worked for the Navy as career appointment Scientist in the same Code 741, RF Technology Branch at the Carderock Division, since 1989. On February 4, 2002, both Petitioner and his twin brother Dr. Yuri Stoyanov filed first EEO discrimination complaints after promotion was denied to the ND-5 Branch Head Interdisciplinary Manager position in Code 741 in the most egregious act of intentional discrimination against Petitioner (YOB 1955, born in Russia) when selecting official by fraud promoted significantly younger (over 14 years) with far inferior qualifications Respondent Mr.

Farley (YOB 1969, born in Kansas) than Petitioner's and Dr. Yuri Stoyanov's qualifications.

3) Petitioner was also denied promotions and assignments to at least six ND-5 positions, which were filled without any vacancy announcements when other significantly younger individuals with inferior qualifications were assigned to a position and secretly promoted under pretext of accretion of duties to deny promotion and cover up intentional age discrimination against Petitioner. The few positions competed through vacancy announcements were also filled by fraud and manipulations of vacancy announcements to deny Petitioner promotion. Petitioner was denied promotions and assignments to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of age discrimination against Petitioner by the selecting second-level supervisor Respondent Mr. King who was about the same age as Petitioner and his twin brother Dr. Yuri Stoyanov.

4) Since February 4, 2002, after Petitioner filed first EEO discrimination complaint, Respondents immediately conspired to escalate discrimination and retaliations against Petitioner and changed Petitioner's work schedule on the same day as the EEO Counselor contacted Respondents on February 21, 2002.

5) One month later, after Petitioner and his brother filed formal EEO discrimination complaints in March 2002, Respondents further escalated discrimination and retaliations and by fraud transferred Dr. Yuri Stoyanov to another technology department from the department where he worked for over fifteen years. Petitioner and his brother filed additional EEO discrimination complaints and

reported violations of laws through the chain of Navy command and to the Office of Special Counsel (OSC) in May 2002.

6) Respondents escalated discrimination and retaliations against Petitioner for participation in protected activities as the individual Respondents conspired to deny Petitioner promotion to ND-5 position and retaliated against Petitioner by excluding Petitioner from managing projects, denied directly funded work, interfered with a term, condition, or privilege of Petitioner's employment, and imposed discriminatory requirements to impose disciplinary actions, intentionally failed to post job announcements and deceived in an effort to conceal promotion opportunity from the Petitioner.

7) Petitioner's age and participation in protected activities had a determinative influence on the Respondents' adverse employment actions and retaliations against Petitioner for participation in prior EEO activities and for Whistleblowing, which was in opposition to the Respondents' conduct or practices violative of ADEA, Title VII, and WPA in addition to disclosures of individual Respondents' fraud, deceptions, violations of Federal laws and Petitioner's rights. Respondents failed to comply with laws and failed to implement the Navy policy of zero tolerance to discrimination in spite of the EEOC finding intentional discrimination committed against Petitioner. As a result of the Respondents' intentional discrimination, violations of laws, and escalated abuse of authority, Petitioner filed over twenty additional EEO discrimination complaints since 2002.

8) In 2004, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found

discrimination in the first EEOC case and ordered the agency to take appropriate disciplinary actions against the responsible management officials. However, Respondents continued violations of laws, the Navy policy of zero tolerance to discrimination, and abuse of authority because the crucial age discrimination claims of failure to promote were improperly dismissed without a hearing at the EEOC level.

9) Since June 2005, Petitioner filed civil actions against the Respondents individually and in their official capacity to restore justice and recover damages because of egregious discrimination and violations of Petitioner's rights. However, the district court unjustly dismissed all claims without a trial by misconstruing facts and ignoring clear evidence of age discrimination, disparate treatment, and retaliations. The Appeals Court for the Fourth Circuit failed to address any issue raised by the Petitioner and his brother in the appeal, docket No. 07-1969 (05-cv-01567-RDB, 05-cv-01611-RDB); instead, the appeals court noted in its decision that "unpublished opinions are not binding precedents in this circuit" thus indirectly admitting that its decision was wrong. Petition for a writ of certiorari (Supreme Court docket No. 07-0024) was denied by the October 6, 2008 order, which failed to take into consideration the gravity of injustice and abuse of discretion committed by the lower courts as decisions were based not on the rule of law and facts, but on the Respondents' deceptions, fraud, and perjuries.

10) In the current case the district court again denied justice and used Respondents' deceptions, premeditated fraudulent assertions and intentional misrepresentations to deny Plaintiff jury trial with

regard to all claims as the district court also failed to sanction Respondents under Fed. Rules of Civ. P. 11 because of the Respondents' fraudulent assertions, deliberate misrepresentations, and unwarranted contentions identified in the Respondents' 12/16/08 Memorandum in support of motion for summary judgment. Petitioner was entitled to the relief because Respondents deceived, failed to defend or otherwise respond to the Petitioner's motions for Sanctions and for Judgment against the Respondents when the Petitioner's motions clearly established that Respondents engaged in deceptions, intentional misrepresentations, fraudulent assertions and frivolous contentions without evidentiary support as Petitioner presented the undisputed evidence that irrefutably established Respondents' conspiracy to escalate discrimination and retaliations against Petitioner for participation in prior EEO activities and for Petitioner's Whistleblowing.

11) The U.S. Court of Appeals for the Fourth Circuit again did not address any issue raised by the Petitioner's appeal in this case, docket No. 09-1900 (06-cv-01245-AMD), but sanctioned unjust and erroneous reasons stated in the district court opinion based on the Respondents' deceptions, intentional material misrepresentations, and perjuries. The appeals court decision, which contradicted its own decisions, decisions of other appeals courts and far departed from this Court's decisions, call for an exercise of this Court's supervisory power to restore justice and grant the petition for a writ of certiorari.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

MOTIONS FOR SANCTIONS AND JUDGMENT AGAINST RESPONDENTS

Petitioner appeals and presents compelling reasons to grant petition for a writ of certiorari because the appeals court for the fourth circuit affirmed the district court's abuse of discretion and unjust denial of the Petitioner's Motion for Sanctions against Respondents under Fed. R. Civ. P. 11 for the Respondents' fraudulent assertions, deliberate misrepresentations, and unwarranted contentions in the 12/16/08 Memorandum as Respondents failed to defend or otherwise respond to the Petitioner's Motion for Sanctions. Respondents also failed to defend or otherwise respond to the Petitioner's Motion in Opposition to summary judgment identifying the undisputed evidence of the Respondents' fraudulent assertions and unwarranted contentions and as such Respondents again admitted making fraudulent assertions and deliberate misrepresentations in the 12/16/08 Memorandum. As a result, Petitioner submitted motions requesting final judgment, which were unopposed also because of clear evidence of the Respondents' fraudulent assertions, unwarranted contentions, and deceptions.

Although, the district court mentioned in the Memorandum Opinion the Petitioner's Motion for Sanctions and motions for final judgment (See Appendix at A6), however, the district court wrongly denied the Petitioner's motions for sanctions and used the Respondents' fraudulent assertions, deliberate misrepresentations, and unwarranted contentions to deny Petitioner a jury trial. The appeals court ignored the district court's abuse of discretion for denying

Petitioner's motions for sanctions and the undisputed evidence of the Respondents' deceptions, fraudulent assertions, and unwarranted contentions in addition to the pattern and practice of adverse employment decisions and antagonism combined with the direct evidence of retaliation and existence of improper motive and intent that were clearly probative and established irrefutable evidence to permit this case for the jury trial because "once the employee has cast doubt upon the employer's proffered reasons for the [adverse action], the issue of whether the employer discriminated against the plaintiff is to be determined by the jury—not the court." *Weisbrot v. Med. Coll. of Wisconsin*, 79 F.3d 677, 681-82 (7th Cir. 1996). Because it was the jury's job to decide factual and credibility questions, the district court abused discretion and unjustly denied Petitioner a jury trial using the Respondents' fraudulent assertions and unwarranted contentions as was acknowledged in the district court's Memorandum Opinion at A12: "defendants contend, and the court unhesitatingly agrees, that as to most of the challenged actions, plaintiff has failed to establish a prima facie case," by deliberately ignoring Petitioner's direct evidence of retaliations, undisputed material facts of the Respondents' intent to retaliate, pattern and practice of intentional discrimination with promotions, and violations of the anti-retaliation provisions of the ADEA, Title VII, and WPA. In addition, the question whether the employee made out a prima facie case is almost always irrelevant because by the time the district court considers an employer's motion for summary judgment, the employer ordinarily will have asserted a non-discriminatory reason for the challenged decision as this Court have clarified in a

number of decisions and the fact that the district court cannot throw out a complaint even if the plaintiff did not plead the elements of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002). The question whether the employee actually made out a prima facie case is "no longer relevant" by the time the district court considers a motion for summary judgment and thus "disappear[s]" and "drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510, 511 (1993); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000). Rather, the undisputed evidence of the Respondents' deceptions, fraudulent assertions, and unwarranted contentions coupled with the direct evidence of the Respondents' disparate treatment, conspiracy to escalate retaliations, and the pattern and practice of discrimination and retaliations against Petitioner and Petitioner's twin brother clearly supported Petitioner's claims and created jury questions and application of the mixed-motive framework, which required at most "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision" for a reasonable jury to find that the Respondents' stated reasons were not the actual reasons and that the Respondents intentionally discriminated against Petitioner. *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995). The district court had before it all the evidence it needed to send the case for a jury trial because the probative evidence "that the employer's explanation is false," would counsel against granting the employer summary judgment. *Reeves*, 530 U.S. at 149. Accordingly, the petition for a writ of certiorari should be granted because the appeals court decision

sanctioned erroneous district court orders that clearly abused discretion and far departed from justice.

RETALIATIONS FOR PARTICIPATION IN PROTECTED ACTIVITIES

The petition for a writ of certiorari should be granted also as a last resort for legal remedies, because the decisions by the lower courts far departed from justice while Petitioner presented direct evidence of the Respondents' conspiracy to escalate retaliations evident in the September 30, 2002 email when the third level supervisor Respondent Jebsen had instructed subordinates: "It's time to crack down on them [Petitioner and his brother]... Dave Caron has mentioned it twice now" after Petitioner and his brother were engaged in prior protected activities already and filed formal EEO discrimination complaints since March 2002. The direct evidence of conspiracy and demonstrably discriminatory motive to retaliate against Petitioner and his brother are obvious to any reasonable mind as Respondent Jebsen conspired with subordinates and the agency representative Respondent Caron to escalate unlawful discrimination and retaliations against Petitioner for participation in protected activities. Furthermore, the direct evidence of the Respondents unlawful retaliation, discriminatory intent, and the causal link between the adverse actions motivated by the Respondents' retaliatory animus for participation in protected EEO discrimination complaint activity and Whistleblowing were in the Letter of Reprimand issued to Petitioner on November 25, 2002. Petitioner filed additional EEO discrimination complaints, made repeated protected disclosures through the chain of command, and engaged in

Whistleblowing activities, which were in opposition to the Respondents' illegal conduct and practices violative of ADEA, Title VII, WPA, and Petitioner's rights. Nevertheless, the lower courts ignored the direct evidence of the Respondents' unlawful retaliations, conspiracy, abuse of authority and intent to escalate discrimination and retaliations against Petitioner. The lower courts issued wrong decisions and clearly abused discretion because "direct evidence would be what [the employer] said or did in the specific employment decision in question" *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997), when the district court failed to consider the direct evidence of retaliations, discriminatory intent, and the causal link between the Petitioner's participation in protected activities and disciplinary action in the fabricated Letter of Reprimand itself for "making unfounded threats regarding discrimination" and "accus[ing] [Respondent Farley] of timecard fraud... Such behavior will not be tolerated." Moreover, the record also showed that the EEOC twice found intentional discrimination committed by Respondent Farley against Petitioner during the two EEOC cases after hearings in the first case in September 2003 and in the second case in August 2004.

The appeals court decision, however, far departed from justice by affirming the district court's erroneous interpretation of facts and law that materially affected the outcome in this case while Petitioner presented the irrefutable direct evidence of the Respondents' retaliations, conspiracy to retaliate, intent to escalate discrimination, and violations of laws in addition to the undisputed evidence of the Respondents' fraudulent assertions,

deceptions, and unwarranted contentions in the Respondents' 12/16/08 Memorandum. The district court's Judge Davis undeniably abused discretion and misconstrued evidence in the 7/6/09 Memorandum Opinion at A13: "Regrettably, as evidenced by the record as a whole and, in particular, by his subsequent termination, plaintiff simply refused to comport himself (or to perform his assigned duties) in accordance with the legitimate expectations of his employer" while blatantly contradicting the undisputed evidence in the record showing that Respondents retaliated, conspired to retaliate, escalated discrimination and economic damages subjecting Plaintiff to these deprivations intentionally, vindictively or with a reckless disregard for Plaintiff's rights, a term, condition, or privilege of his employment. Judge Davis undeniably abused discretion because a district judge's function in deciding the merit of a motion for summary judgment "is not himself to weigh the evidence." *Anderson v. Liberty, Inc.*, 477 U. S. 242, 249 (1986). Evidence showed that Respondents intentionally retaliated against Petitioner and by fraud unlawfully removed Petitioner from the Scientist position after 14 years of exemplary performance in November 2003 shortly after the EEOC found that Respondents intentionally retaliated against Petitioner in September 2003. The district court denied Petitioner justice when the Petitioner's case about removal was dismissed because of the district court's abuse of discretion and negligence as Judge Davies denied continuance to conduct discovery, denied Petitioner a jury trial, and failed to make any decision for about three months[1] in the prior case AMD-05-2819. One

[1] The appeals court dismissed Petitioner's appeal as untimely

layer of fraudulent assertions and unjust decisions was covered by another layer of fraudulent assertions and unjust decisions as Judge Davies continued abuse of discretion concluding in the district court's 7/6/09 Memorandum Opinion at A13: "Manife[s]tly, plaintiff has not established a causal connection between his protected activity and the adverse employment actions. (Plaintiff prevailed on a single retaliation claim during the administrative processing of his claims; as a result, defendant was ordered to provide him with a new computer. These facts are of no moment in this ease.)," contrary to the undisputed direct evidence of the Respondents' conspiracy to retaliate and escalate discrimination, abuse authority, and direct evidence of retaliation in the Letter of Reprimand itself, Petitioner's participation in protected EEO activities and Whistleblowing activities, in addition to a "temporal proximity" between the Petitioner's protected activities and the adverse employment actions committed by Respondents shortly after Petitioner initiated administrative processes filing ADEA and Title VII claims in the formal EEO discrimination complaints since March 2002. See *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 280 (3d Cir. 2000); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989); *Kachmar v. SunGard Data Sys., Inc.*, 109

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filed in spite of the fact that Petitioner timely filed appeal from the final order of 2/25/08. This Court denied petition for a writ of certiorari; No. 08-888. As a result of the appeals court decisions far departing from justice by affirming the district court's orders and judgment based on erroneous interpretation of facts and law, negligence and the Respondents' deceptions, intentional misrepresentations, and violations of laws, Petitioner was denied justice and fair adjudication on the merits of the claims at a jury trial.

F.3d 173, 178 (3d Cir. 1997). The district court undeniably erred and abused discretion by issuing orders and judgment based on deceptions, fraud, and intentional misrepresentations neglecting the direct evidence of the Respondents' retaliations, the nexus of adverse actions against Petitioner and the cumulative effect of a pattern and practice of intentional discrimination and retaliations for Petitioner's participation in protected activities by looking at the evidence as a whole because "a discrimination analysis must concentrate not on individual incidents, but on the overall scenario." See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

In addition, the appeals court wrong decision far departed from justice by affirming the district court's erroneous interpretation of facts and law in the 7/6/09 Memorandum Opinion at 4: "This court set out the controlling legal principles in its prior Memorandum Opinion as follow: Defendants contend and this Court agrees that Plaintiff cannot sustain a claim for employment discrimination with direct evidence. In the absence of direct evidence, this Court must apply three-step burden-shifting model ...," which contradicted facts, the direct evidence of intentional retaliation, and the EEOC decision finding intentional discrimination against Petitioner in the Letter of Reprimand during the EEOC hearing. The district court undeniably abused discretion and erred because in the "mixed-motive" cases direct evidence of retaliation is sufficient to show that the defendant's activity was motivated by retaliatory animus. See *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003). The district court's erroneous interpretation of facts and law, negligence, and abuse

of discretion by ignoring direct evidence of retaliations and discrimination as claimed in the current case and also found during the administrative processing of the Petitioner's claims in the second EEOC case in addition to the retaliation found in the first EEOC case with regard to the "computer" further established that the appeals court decision contradicted its own decisions, decisions of other appeals courts and far departed from justice that call for an exercise of this Court's supervisory power to grant the petition for a writ of certiorari and vacate the appeals court decision.

The district court decision with regard to retaliation claims also conflicted and far departed from this Court's decision in *Burlington N. & S.F. Ry. v. White, 26 S. Ct. 2405, 2415 (2006).* The claims identified in the district court's Memorandum Opinion at A8 further established the pattern and practice of intentional discrimination and retaliations against Petitioner for participation in protected activities. The undisputed evidence showed that Petitioner had reasonable belief and found materially adverse denied promotion and denied assignments to career ladder positions, denied directly funded work and denied incentive pay demo points, denied restoration of annual leave, in addition to materially adverse interference with Petitioner's work and hostile conditions of Petitioner's employment, aggravated harassment, and unwarranted disciplinary actions as the Letter of Reprimand and retaliatory suspension[2]

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[2]The district court used the Respondents' fraudulent assertions and deceptions and abused discretion by wrongly concluding (instead of a jury) in the 7/6/09 Memorandum Opinion at A13: "Finally, the record shows beyond doubt that defendants' decision to suspend plaintiff without pay for eight days (fewer

than ten days recommended by his supervisor) was wholly justified" contrary to the undisputed evidence Petitioner presented in the Motion in Opposition to summary judgment and the Petitioner's affidavit supported by undisputed evidence that the suspension was on intentionally fabricated baseless accusations and was a pretext to escalate discrimination and retaliations against Petitioner for participation in protected activities. It is indisputable that summary judgment cannot be granted to the employer if there is a genuine issue of material fact. *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 329-31 (3d Cir. 1995). The undisputed evidence in the record showed that Respondent Farley fabricated charges and deliberately misrepresented facts in the Letter of Proposed Ten Day Suspension. By fraud Farley accused Petitioner that Petitioner did not inform Farley about receiving $55K for the ILIR project. After being sworn during the EEOC Hearings on 6/7/04 and 7/22/04, Farley continued fraud that Petitioner did not inform him about receiving $55K; however, the EEOC hearing record established that Farley committed perjuries and Petitioner impeached Farley by showing direct evidence to Farley that Petitioner informed Farley about receiving $55K and timely requested that the $55K funding be allocated to the existing Code 74 job order number (JON). See HT 7/22/04 p. 149. The EEOC hearing and the evidence in the record proved that the suspension from work without pay was fabricated and was based on fraud, deceptions, and intentional misrepresentations as a pretext to escalate harm, discrimination and retaliations against Petitioner for participation in protected EEO and Whistleblowing activities. HT 7/22/04, p. 336-349. The jury's disbelief of the Respondents' reasons would be enough for the jury to discredit the Respondents' explanation. *Brewer*, 72 F.3d at 329-31. It is evident that this dispute, whether the suspension from work without pay was fabricated in retaliation against Petitioner as Petitioner performed his duties, is a material issue of fact and a jury could conclude from the Respondents' conflicting testimony that Respondents' lied, committed perjuries and intentionally discriminated and retaliated against Petitioner in reprisal for Petitioner's participation in EEO and Whistleblowing activities because "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a

without pay. However, the appeals court decision affirmed the district court's abuse of discretion and clearly contradicted this Court's conclusion that the anti-retaliation provisions are violated whenever the employer responds to protected activity in such a way that a reasonable employee would have found the challenged action materially adverse. See *White, 26 S. Ct. at 2415.* The district court abused discretion and clearly misconstrued facts by accepting the Respondents' deceptions, fraudulent assertions, and intentional misrepresentations in the Respondents' 12/16/08 Memorandum and by ignoring evidence in the Petitioner's Motion in Opposition and Motion for Sanctions against Respondents under Fed. R. Civ. P. 11 that were unopposed. The direct evidence of retaliations and demonstrably discriminatory motive to retaliate against Petitioner in addition to the claims of a series of related distinct acts of intentional discrimination and retaliations against Petitioner during administrative processing of the Petitioner's EEO discrimination complaints were sufficient to defeat summary judgment besides the raised question of the Respondents' credibility that should be decided by a jury during the trial. Accordingly, Petitioner respectfully submits a writ of certiorari for an exercise of this Court's supervisory power to restore justice.

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material fact as affirmative evidence of guilt.'" *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 648 (4th Cir. 2002) (quoting *Reeves*, 530 U.S. at 147). Nevertheless, the district court abused discretion, deliberately misconstrued facts, and denied Petitioner a jury trial using the Respondents' deceptions, perjuries and fraudulent assertions to the court in violation of Fed. R. Civ. P. 11 as the district court failed to sanction Respondents for deceptions, fraudulent assertions, and deliberate misrepresentations.

AGE DISCRIMINATION

Petitioner appeals and presents compelling reasons to grant petition for a writ of certiorari based on the relevant decisions of this Court. In *Reeves* this Court established what showing a plaintiff had to make regarding pretext in the age discrimination case and, specifically, whether a plaintiff could satisfy his burden by merely rebutting the defendant's explanation for the action. The appeals court for the fourth circuit also had applied the *Reeves* methodology to allow a plaintiff to survive summary judgment and sustained a jury verdict for plaintiff in the failure to promote case. See *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d at 649-50 (4th Cir. 2002). The appeals court held that "the *Reeves* formulation operates based on "the strength of the prima facie evidence in creating an inference of discrimination." *Id* at 648. Petitioner presented ample evidence to defeat Respondents' motion for summary judgment and clearly established an inference of intentional discrimination and retaliations for claims of denied promotions and assignments leading to promotion.

The appeals court decision in this case, however, far departed from justice by affirming the district court's orders and judgment that abused discretion and far departed from the accepted decisions by concluding in the Memorandum Opinion at A13: "he never properly applied for an advertised job," which clearly contradicted and far departed from the appeals court decision made in *Mauro v. Southern New England Telecomms.*, Inc., 208 F. 3d at 387 (2d Cir. 2000): "requiring the plaintiff to show that he or she applied for the specific jobs at issue would be unrealistic as an employee by definition cannot apply

for a job that he or she does not know exists". Moreover, Petitioner presented direct evidence that Respondents deceived or misled Petitioner about the vacancy announcement (VA) CAR 02-0074 for the deputy director of the O5T program at NAVSEA in an effort to conceal a promotion opportunity and to deny Petitioner promotion as part of continuous discrimination on bases of age, national origin and in reprisal for participation in protected activities. As the undisputed direct evidence of intentional discrimination, disparate treatment, and retaliation against Petitioner showed, Respondent Fowler provided information about the VA CAR 02-0074 to the 38-years old selectee while on the very same day denied such information to the 47-years old Petitioner by explicitly telling Petitioner "to request this type of information" from EEO office "since you have an ongoing EEO case" when the selectee and both Petitioner and his brother requested information about the available vacancy announcements. Fowler was aware about the vacancy on September 20, 2002, however, intentionally did not post this vacancy until the day it closed on September 24, 2002 and then deceived or misled the EEO complaints manager that there was no vacancy announcement in Code 70 in an effort to conceal a promotion opportunity from Petitioner. Undisputed evidence showed that Fowler already knew and in fact admitted to Goldman that VA CAR-02-0074 was a "name request" vacancy "posted for reasons I can not will not go into at this time" and "Only one person will even be considered" in response to Goldman's warning that "posting it like this may be worst than not posting it at all, and may lead to major whining", "[t]his is the type of thing our

employees constantly complain about" if "we don't even go through the motions ..." The district court undeniably abused discretion neglecting Respondents' deceptions, fraud, abuse of authority, deliberate misrepresentations, and the undisputed evidence of disparate treatment as the very nature of the Respondents' actions were disputed since "the hiring process itself, rather than just the decision making behind the process, is implicated in the discrimination claim or is otherwise suspect." *EEOC v. Metal Serv. Co.*, 892 F. 2d 341, 349 (3d Cir. 1990). However, the appeals court sanctioned a departure of the lower court from accepted decisions that was in conflict with the court's own decision in *Williams v. Giant Food Inc*, 370 F.3d 423 (4th Cir. 2004), which reversed the district court's summary judgment concluding that *Williams* created a genuine issue of material fact relevant to her failure-to-promote claims and can establish a *prima facie* case if she can show that she was unaware of the promotion opportunities because the company did not follow its own policy.

Furthermore, Petitioner clearly established strong *prima facie* case of age discrimination and retaliation in this case. In fact, the EEO Commission found that Petitioner "established a prima facie case of age, national origin and reprisal discrimination" for most of the Petitioner's claims. However, the district court abused discretion and far departed from justice by making a decision about a question of fact instead of a jury, which could return a verdict in favor of Petitioner. The appeals court decision also far departed from justice by affirming the district court's erroneous judgment that abused discretion concluding in the Memorandum Opinion at A13 and

ignoring evidence for the third elements of a *prima facie* case: "he did not meet the minimum qualifications," which clearly contradicting undisputed evidence that Petitioner was the most qualified with a Ph. D. in physics and over 12 years of experience in the technology required for the position while significantly (more than 9 years) younger selectee had far inferior qualifications and experience and, in fact, the selectee admitted that her technical background was not strong enough for a promotion and she did nothing to strengthen her technical background. The district court far departed from the accepted decision of this Court's recent finding that an employee's claimed superior qualifications for the position sought could show that the employer's articulated reasons were pretextual. See *Ash v. Tyson Foods, Inc., 126 S. Ct. 1195* decided on February 21, 2006. The district court had undisputed evidence to infer that unlawful age discrimination played a role in the Respondents' selection processes as Petitioner specifically challenged the selection process and identified the undisputed evidence of disparate treatment and the direct evidence of intentional age discrimination since the position was filled by a significantly younger (more than 9 years) selectee with far inferior qualifications who was outside of the protected group. The appeals court did not address the issue of intentional age discrimination and retaliations, but sanctioned erroneous judgment and significant departure of the lower court from the accepted decisions that call for an exercise of this Court's supervisory power.

In addition, Petitioner presented direct evidence of the selecting official's discriminatory attitude

based on Petitioners' age. The direct evidence of discriminatory attitude expressed in the email of the selecting official 46-years old Respondent King about "real paucity of employees in the 26 to 36 year age bracket," distress for being above the average age of 44, and "need for fresh ideas and enthusiastic energy of new employees" was ignored by the district court. The undisputed direct evidence in this case showed that the district court far departed from the accepted decisions since "direct evidence would be what [the selecting official] said or did in the specific employment decision in question." See *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). The undisputed evidence of discriminatory attitude because of Petitioners' age and a pattern and practice of age discrimination when Respondent King did not select or assign the most qualified Petitioner to a number of positions, but selected the youngest and the least qualified individuals, were sufficient to defeat summary judgment. Petitioner presented ample evidence of a pattern and practice of age discrimination against him as a series of secret promotions of younger employees with inferior qualifications than Petitioners' qualifications under the pretext of "accretion of duties" in an effort to conceal a promotion opportunity from Petitioner. The undisputed evidence of a pattern and practice of age discrimination in a series of denied promotions and assignments to the positions leading to promotion established disparate treatment and created an inference of age discrimination against Petitioner because promotions under the "accretion of duties" were unknown to Petitioner and were made secretly in violation of the agency own regulations specifically requiring that "[t]he

potential for future promotion must be made known to all potential applicants". The district court further abused discretion by ignoring the undisputed evidence of disparate treatment with denied assignments to positions of higher responsibility leading to promotion because of intentional discrimination and retaliations against Petitioner. Petitioner was unaware of the promotion and assignment opportunities and in fact the vacancy announcement was not posted for the LHA(R) and DD (X) Signature Coordinator positions contrary to the policy to compete positions and assignments leading to promotions, while the CVNX position was competed and Plaintiff applied for the assignment with 11 other candidates. The appeals court did not address any issue of intentional age discrimination and retaliations against Petitioner, but sanctioned obvious departure of the lower court from the court's own decision in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d at 760-61 (4th Cir. 1998), finding that an individual plaintiff may "use evidence of a pattern or practice of discrimination to help prove claims of individual discrimination within the McDonnell Douglas framework."

The district court also ignored direct evidence of the discriminatory attitude based on Petitioners' age, reprisals, undisputed evidence of disparate treatment, deceptions, deliberate misrepresentations and the pattern and practice of age discrimination against Petitioner in a series of promotions of younger employees with inferior qualifications than Petitioner's qualifications in addition to the direct evidence of intent to escalate discrimination and retaliations that were highly relevant and clearly probative to the existence of discriminatory attitude

and discriminatory motive towards Petitioner. The appeals court did not address these issues and sanctioned a departure of the lower court from the accepted decisions regarding direct evidence of discriminatory attitude and disparate treatment because of Petitioners' age, national origin and participation in protected activities. As this Court held in *Smith v. City of Jackson*, 544 U.S. 228 (2005), the ADEA authorizes recovery on disparate impact claims, comparable to the claim established in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which announced a disparate impact theory of recovery under Title VII cases. Since the appeals court decision sanctioned wrong and erroneous district court opinions and decisions that conflicted and far departed from this Court's decisions, Petitioner respectfully submits a writ of certiorari for an exercise of this Court's supervisory power to restore justice.

CONCLUSION

Wherefore, in consideration of the above, the petition for a writ of certiorari should be granted because the appeals court decision sanctioned erroneous district court orders and judgment that clearly abused discretion and far departed from justice.

Date 5/21/10

Respectfully submitted,

Aleksandr Stoyanov

Aleksandr Stoyanov

APPENDIX
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Case: 09-1 900 Document: 16
Date Filed: *02/2612010*

FILED: February 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 09-1900
(1: 06-cv-01245-AMD)

ALEKSANDR J. STOYANOV,

Plaintiff — Appellant

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN N. PETRI, Individually and in his Official Capacity as the Head of the Carderock Division; GARY H. JEBSEN, Individually and in his Official Capacity as the Head of Code 70; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709; KEVIN M. WILSON,

Individually and in his Official Capacity as the Head of Code 74; JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderoc]c Division; JOHN C. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74; STEPHAN M. PARLEY, Individually and in his Official Capacity as the Head of Code 741; ROGER P. FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39,

Defendants - Appellees

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Judge Duncan and Senior Judge Hamilton.

For the Court

/s/Patricia S. Connor, Clerk

Case: 09-1900 Document: 12

Date Filed: *12/17/2009*

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 09-1900

ALEKSANDR J. STOYANOV,

Plaintiff - Appellant,

V.

DONALD C. WINTER, Secretary of the Navy; STEPHAN N. PETRI, Individually and in his Official Capacity as the Head of the Carderock Division; GARY N. JEBSEN, Individually and in his Official Capacity as the Head of Code 70; GERALD SMITH, Individually and in his Official Capacity as Deputy Head of Code 70 Carderock Division; M. KATHLEEN FOWLER, Individually and in her Official Capacity as Administrative Officer Code 709; KEVIN H. WILSON, Individually and in his Official Capacity as the Head of Code 74; JAMES H. KING, Individually and in his Official Capacity as the Head of Code 74 Carderock Division; JOHN C.. DAVIES, Individually and in his Official Capacity as the Deputy Head of Code 74; STEPHAN M. FARLEY, Individually and in his Official Capacity as the Head of Code 741; ROGER P. FORD, Individually and in his Official Capacity as the Head of Code 7014 Carderock Division; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39,

Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge. (1:06-cv-0 124 5-AND)

Submitted: December 15, 2009
Decided: December 17, 2009

Before MICHAEL and DUNCAN, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Aleksandr J. Stoyanov, Appellant Pro Se.
John Walter Sippel, Jr., Assistant United States Attorney, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Aleksandr J. Stoyanov appeals the district court's order dismissing his claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (2006), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (2006), the Whistleblower Protection Act, 5 U.S.C. §§ 1214, 1221 and 2302 (2006), and various state law tort claims, as well as its order denying his Fed. R. Civ. P. 59(e) motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. See Stoyanov v. Winter, No. 1:06-cv-01245-AMD (D. Md. July 6, 2009; July 14, 2009). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff
v. Civil No. AMD 06-1245

GORDON R. ENGLAND, SECRETARY
OF THE NAVY) et al.,
Defendants

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 6th day of July, 2009, by the United States District Court for the District of Maryland ORDERED:

(1) Plaintiffs motions for judgment and for sanctions (Paper Nos. 30, 33, 39, 42, and 46) are DENIED; and it is further ORDERED

(2) Defendants' motion to dismiss or in the alternative for summary judgment (Paper No. 34) is GRANTED and JUDGMENT IS ENTERED IN FAVOR OF DEFENDANTS AGAINST PLAINTIFF; and it is further ORDERED

(3) The Cleric shall TRANSMIT a copy of this Order and the foregoing Memorandum Opinion to plaintiff pro se and CLOSE THIS CASE.

/s/
ANDRE M, DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff

V. Civil No. AMD-06-1245

DONALD C. WINTER, SECRETARY
OF THE NAVY, et at,
Defendants

MEMORANDUM OPINION

This case is the third of six federal employment discrimination actions instituted by pro se plaintiff Aleksandr J. Stoyanov in this court Plaintiff was formerly employed by the Department of the Navy as a scientist. In this as in all of his actions, plaintiff alleges, *inter alia,* that he suffered discrimination in the workplace based on national origin and age, and that he has been the victim of retaliation for his involvement in protected activity. Essentially, plaintiff has pyramided his claims and filed judicial actions *seriatim* while frequently if not invariably incorporating earlier allegations into later complaints. Now before the court is defendants' motion to dismiss, or in the alternative, for summary judgment, treated here as a motion for summary judgment Plaintiff has filed opposition papers, four "motions for judgment" and a motion for sanctions. Oral argument is not necessary. For the reasons that follow, defendants' motion shall be granted and plaintiff's motions shall be denied.

Plaintiff flied his first formal charge of discrimination in or about March 2002. Although the matter is not free of all doubt given the proliferation and redundancy of plaintiff's claims, it appears that the present action encompasses allegations of discriminatory and retaliatory treatment occurring from in or about spring 2002 through the fall 2003, not

including plaintiff's termination of employment effective in November 2003. In any event, the relevant procedural/factual context of this and the multitude of related cases filed by plaintiff (and virtually identical claims and cases filed by his twin brother) is described in detail in earlier opinions by this court. *See Stoyanov v. Winter,* 2006 WL 5838450 (D.Md. July *25,* 2006) (Bennett, J.) (granting in part and denying in part defendants' motion to dismiss two consolidated cases, one filed by each brother, arising out of their first administrative charge of discrimination); *id.,* 2007 WL 2359771 (D.Md. Aug. 15, 2007) (Bennett, J.) (granting defendants' post-discovery dispositive motion and entering judgment for defendants in consolidated cases), *aff'd,* 2008 WL *501275* (4th Cir. Feb. *25,* 2008) (unreported) (affirming judgment in. favor of defendants), *cert. denied,* 129 S.Ct. 258 (2008); No. AMD 05-2819 (D.Md. February 25, 2008) (Davis, J.)(sustaining Aleksandr Stoyanov's termination of employment), *off'd in part and dismissed in part,* 290 Fed.Appx. 636, 2008 WL 4073032 (4th Cir. Sept. 3, 2008), *cent. denied,* 129 S.Ct. 1620 (2009). See *also Stoyanov v. Merit Systems Protection Bd., 474* F.3rd 1377 (Fed. Cir. 2007)(affirming dismissal of Whistleblower Act claims), *cert. denied,* 128 S.Ct. 247 (2007). That history need not be repeated here.

As mentioned above, this is plaintiff's third judicial action for relief. What is perfectly apparent is that the prior opinions and orders of this court leave very little to be adjudicated here. Plaintiff was born in Russia on April 7, 1955, and became a United States citizen in 1984. In 1989, plaintiff began working as a scientist for the Department of the Navy's Naval Surface Warfare Center, Carderock Division ("NSWCCD"), in West Bethesda, Maryland. *Id*

Starting no later than early 2002, plaintiff (with his brother's full or near-full involvement) embarked on a series of clashes with his supervisors over a myriad of issues. As a result, plaintiff received a letter of reprimand in November 2002, was suspended without pay for eight days in September 2003, and, finally, was terminated in November 2003, based on an October 6, 2003, Notice of Proposed Removal. As mentioned above, plaintiff's challenge to his termination was finally determined in Case No. AMD 05-2819, *supa*.

II.

The court concludes from its careful review of the record, with the assistance of the briefing on defendants' motion, that, at best, plaintiff presents challenges to the following pre-termination adverse actions:

1. Non-selection for an ND-5 position as deputy director of the O5T program at NAVSEA;

2. Non-selection for the LHAR program manager position in October 2002;

3. Non-assignment to the DDX gold team signature coordinator position in October 2002;

4. Non-assignment to the CVNX survivability program coordinator in November 2002;

5. Discriminatory treatment in respect to the Malibu Antenna Project;

6. Letter of reprimand on November 25, 2002;

7. Non-award of "Demo points" (performance pay increase) for fiscal year 2002;

8. Non-restoration of annual leave;

9. Non-selection for the interdisciplinary engineer ND-5 position under Vacancy Announcement CAR 02-0087;

10. Non-selection for position under Vacancy Announcement CAR 02-0074; and

11. Disciplinary Suspension for eight days effective September 8, 2003.

Plaintiff seemingly alleges that each one of the above adverse actions, considered individually and in the aggregate, violates his rights to be free of discrimination and retaliation. The court disagrees.

III.

This court set out the controlling legal principles in its prior Memorandum Opinion as follows:

> Defendants contend and this Court agrees that Plaintiff cannot sustain a claim for employment discrimination with direct evidence. In the absence of direct evidence, this Court must apply the well established three-step burden-shifting model of circumstantial evidence of discrimination set forth in *McDonnell Douglas Corp.* v. *Green* to Plaintiff's remaining discrimination claims. 411 U.S. 792,

802 (1973). Although the *McDonnell Douglas* burden-shifting model, was established in a Title VII case, this Court has applied the same analysis to claims brought under the ADEA for age-based discrimination. *See, e.g., Caussacle v. Brown,* 924 F. Supp. 693, 698 (D. *Md.* 1996), *aff'd,* 107 F.3d *865* (4th Cir. 1997); *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 239 (4th Cir. 1982). Therefore, Plaintiffs claims for employment discrimination on the basis of national origin and age are subject to the *McDonnell Douglas* burden-shifting model.

As set forth in *McDonnell Douglas,* to establish a cause of action for employment discrimination, a plaintiff must first demonstrate a prima facie case of discrimination. 411 U.S. at 802. If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the "employer to articulate some legitimate, nondiscriminatory reasons" for the employer's adverse employment action. *Id* However, the Fourth Circuit has emphasized that "Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette* v. *Corning, inc.,* 133 F,3d 293, 298 (4th Cir. 1998) *(quoting Jiminez v. Mary Washington Coll.,* 57 F.3d 369, 377 (4th Cir. 1995)). This Court should not act as a "super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination. *Id.* at 298—99 (internal quotations and citations omitted). Moreover, "when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not [this Court's]

province to decide whether the reason was wise, fair or even correct, ultimately, so long as it truly was the reason for the plaintiffs termination." *Id.* at 299 (quoting *Giannopoulus v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir. 1997)).

If the employer articulates a legitimate nondiscriminatory reason for the employer's adverse employment action, the ultimate burden shifts to the plaintiff to show that the employer's proffered reasons for the adverse action are pretextual. *E.g., McDonnell Douglas,* 411 U.S. at 804; *DeJarnett,* 133 F.3d at 299; *Williams v Cerebonics, inc.,* 871 F.2d 245, 255 (4th Cir. 1989).

To establish a prima facie case of discriminatory discharge under Title VII and the A.DEA, Plaintiff must establish that (1) he is a member of a protected class; (2) he suffered from an adverse employment action; (3) at the time his employer took the adverse employment action, he was performing at a level that met his employer's legitimate expectations; and *(4)* the position remained open or was filled by a similarly qualified applicant outside the protected class. See, e.g., *Oguezono v. Genesis Health Ventures inc.,* 415 F. Supp. 2d 577, 586~-87 (D. Md. 2005) (Bennett, J,) (citing *King v Rumsfeld,* 328 F.3d 145, 149 (4th Cir. 2003)) (Title VII); *Miles v. DelL Inc.,* 429 F.3d 480, 485 (4th Cir. 2005) (quoting *Hill* v. *Lockheed Martin Logistics Mgmt.,* 354 F.3d 277, 285 (4th Cir. 2004)) (en banc) (age). If a prima facie case of discrimination is established, "an inference of discrimination arises that may be rebutted by

an employer on a showing of legitimate nondiscriminatory reasons 'for the dismissal." *Williams* v. *Cereberonics, Inc.,* 871 F.2d 452, 455-56 (4th Cir. 1989) (citing *Smith v. Univ. of N.C.,* 632 F.2d 316, 332-33 (4th Cit. 1980)).

* * * *

To prove a prima facie ease of retaliation, Plaintiff must establish that (1) that he engaged in protected activity; (2) his employer took an adverse action against him; (3) a reasonable employee would have found the challenged action materially adverse; and (4) there was a causal connection between the activity and the challenged action." *Burlington N. & S.F.J?. Co. v. White,* 126 5. Ct. 2405, 2415 (2006); *Price v. Thompson,* 380 F.3d 209, 212 (4th Cir. 2004) (citation omitted). In *Burlington,* the Supreme Court held that the Title VII anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 1 26 S. Ct. at 2409. The Court further explained that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.*

These same principles apply to this ease. As with the challenge to plaintiff's termination, defendants concede that plaintiff was a member of a protected class based on his national origin and age, and that prior to any of the challenged actions, plaintiff had engaged in protected activity. Nevertheless, defendants contend, and the court unhesitatingly agrees, that as to most of the challenged actions, plaintiff has failed to establish a prima facie case, e.g.,

he never properly applied for an advertised job, he did not meet the minimum qualifications, and he was not performing his existing duties satisfactorily. Moreover, as defendants have meticulously laid out, neither the refusal to restore annual leave nor the refusal to award plaintiff "Demo points" for 2002 has been shown to be pretexts for discrimination or retaliation. Finally, the record shows beyond doubt that defendants' decision to suspend plaintiff without pay for eight days (fewer than the ten days recommended by his supervisor) was wholly justified. Regrettably, as evidenced by the record as a whole and, in particular, by his subsequent termination, plaintiff simply refused to comport himself (or to perform his assigned duties) in accordance with the legitimate expectations of his employer. Manifestly, plaintiff has not established a causal connection between his protected activity and the adverse employment actions. (Plaintiff prevailed on a single retaliation claim during the administrative processing of his claims; as a result, defendant was ordered to provide him with a new computer. These facts are of no moment in this case.)

IV.

For the reasons stated above, defendants' dispositive motion shall be granted and plaintiffs motions shall be denied. An Order follows.

Filed: July 6, 2009

/s/
Andre M. Davis
United States District Judge